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10
11 UNITED STATES DISTRICT COURT
12 NORTHERN DISTRICT OF CALIFORNIA
13 SAN FRANCISCO DIVISION
14

15 ROBERT BOSCH HEALTHCARE
SYSTEMS, INC.,

16 Plaintiff,

17 v.

18 CARDIOCOM, LLC and ABBOTT
19 DIABETES CARE, INC.,

20 Defendants.

Case No. 14-CV-01575 EMC

**BOSCH'S OPPOSITION TO
CARDIOCOM'S MOTION TO STAY
LAWSUIT PENDING *INTER PARTES*
REVIEW AND REEXAMINATION OF
PATENTS-IN-SUIT**

Date: June 19, 2014
Time: 1:30 p.m.
Courtroom: 5
Judge: Edward M. Chen

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1 Plaintiff Robert Bosch Health Care Systems, Inc. (“Bosch”) hereby opposes Defendant
2 Cardiocom, LLC’s (“Cardiocom”) motion to stay (Dkt. No. 98).

3 **I. INTRODUCTION**

4 This is a patent infringement action brought by Bosch against its direct competitor
5 Cardiocom. After litigating this case for over a year, Cardiocom has moved for a stay pending
6 the outcome of petitions it filed with the U.S. Patent Office seeking post-grant review of the
7 Bosch patents-in-suit. A stay, however, is plainly unjustified. Bosch has already defeated
8 petitions by Cardiocom on nearly half of the patents-in-suit, with the Patent Office finding that
9 Cardiocom had not even made the threshold showing needed to institute proceedings. Moreover,
10 were a stay granted, Cardiocom would be able to continue its infringement unchecked and
11 unfairly force Bosch to compete against its own patented technology while Cardiocom “runs out
12 the clock” on Bosch’s patents, which expire in 2016 and 2017. Because of the unique and time-
13 sensitive opportunities available to Bosch and a small number of competitors, including
14 Cardiocom, there would be no way to compensate Bosch for this harm.

15 Bosch’s infringement claims should be adjudicated without further delay. The parties
16 have already invested substantial effort and resources in this litigation, including document
17 production; written discovery; infringement and invalidity contentions; and claim construction
18 exchanges. The Court has now heard Bosch’s motion to disqualify Cardiocom’s counsel. And
19 Bosch’s motion to transfer this case back to Texas, where it was originally brought, would put
20 this case back on track for a quick and efficient resolution.¹ Cardiocom’s decision to seek a stay
21 at this late hour is but a tactical maneuver designed to avoid the consequences of Bosch’s
22 motions. Such gamesmanship should not be rewarded by the Court.

23 Rather than explain its thirteen-month delay or try to justify why a stay is appropriate at
24 this late stage, Cardiocom relies almost entirely on Judge Davila’s decision to stay a separate,
25 unrelated case between the parties. That decision, however, was based on completely different
26 facts. First, Judge Davila relied on an offer made by Bosch’s predecessor-in-interest to license

27
28 ¹ Transfer to Texas would moot the present motion, as any stay should be decided by the Texas court.

1 different patents to Cardiocom in order to find that Cardiocom's status as a competitor did not
2 preclude a stay. The patents asserted in this case, however, issued *after* that license offer was
3 extended to, and rejected by, Cardiocom, making such conduct irrelevant to this case. Thus, the
4 competitive harm to Bosch weighs strongly against a stay. Second, the Patent Office instituted
5 proceedings on all six patents in Judge Davila's case, whereas here the Patent Office has already
6 rejected several of Cardiocom's petitions. Finally, in that case, Cardiocom sought a stay at an
7 early stage and before any of the substantial litigation activities that have occurred here.

8 In short, neither Judge Davila's earlier decision nor the facts of this case support a stay,
9 and Cardiocom's motion should be denied.

10 **II. FACTS**

11 Cardiocom's motion to stay is the latest in a string of tactics to delay and avoid a decision
12 on the merits. Cardiocom knows the patents-in-suit are expiring and hopes to avoid liability
13 through such procedural gambits. To date, Cardiocom has sought to institute eleven *inter partes*
14 reviews and two *ex parte* reexaminations before the United States Patent Office ("PTO"), on just
15 the six patents-in-suit. While the PTO rejected petitions on half of the patents, Cardiocom
16 continues to infringe. Cardiocom now seeks to "run out the clock" on the patents-in-suit by
17 ensuring that the patents expire before Bosch gets its day in court.

18 **A. Cardiocom Litigated This Case and Is Now Moving to Stay Only for Tactical** 19 **Reasons.**

20 Bosch filed this case over a year ago, on April 26, 2013, in the Eastern District of Texas.
21 On June 17, 2013, Cardiocom made the tactical decision to move to transfer the case to this
22 district based on the "first-filed" rule rather than seek a stay while the case was at an early stage.
23 (Dkt. No. 15.) Even after Cardiocom had filed petitions for *inter partes* review (IPR) with the
24 PTO, Cardiocom expressly conceded that "a stay of this case is not at issue in this motion"
25 (Dkt. No. 26 at 4.)

26 While Cardiocom's motion to transfer was pending, the Court set a scheduling conference
27 on January 3, 2014. (Dkt. No. 38.) Cardiocom did not raise the issue of a stay with the Court or
28 even address the pending motion to transfer. Instead, the parties and the Court proceeded with

1 the litigation. Bosch served its infringement contentions on December 20, 2013, detailing how
2 the accused Cardiocom products infringe specific claims. (Decl. of Andrew S. Ong in Supp. of
3 Opp. to Mot. to Stay (“Ong Decl.”), ¶ 3.) The Court set the case for trial in January 2015, and the
4 parties submitted a proposed docket control order in which Cardiocom agreed, *inter alia*, to
5 substantially complete document production by May 16, 2014 – two weeks ago. (Dkt. No. 43 at
6 3.)

7 To meet these deadlines, the parties began discovery in earnest. Beginning in late January
8 2014, the parties exchanged document requests and interrogatories. (Ong Decl., ¶ 4.) Cardiocom
9 served invalidity contentions on February 14, 2014. (*Id.*, ¶ 5.) As required by the Texas Patent
10 Rules, Cardiocom simultaneously produced documents showing the operation of accused
11 instrumentalities, including source code. (*Id.*) In February, Bosch’s counsel and expert flew to
12 Minneapolis, where Cardiocom produced its source code, to spend days reviewing the code and
13 documenting specific instances of infringement. (*Id.*, ¶ 6.) Pursuant to Judge Gilstrap’s Standing
14 Order, Bosch then served supplemental infringement contentions incorporating the source code
15 evidence on March 17, 2014. (*Id.*, ¶ 7.) To date, Cardiocom has produced approximately 13,400
16 pages of documents in discovery, and Bosch has produced over 73,000 pages. (*Id.*, ¶ 8.) The
17 parties have also provided over 6,000 pages of contentions and interrogatory responses. (*Id.*)

18 While Cardiocom remained silent on the issue of a stay, the case proceeded to the claim
19 construction phase. On February 21, 2014, pursuant to Texas Patent Rule 4-1, the parties
20 exchanged their identification of terms that may require construction, with Cardiocom identifying
21 110 terms (not counting variations) across the six patents. (*Id.*, ¶ 9.) The parties met and
22 conferred in an effort to reduce this list. (*Id.*) On March 14, 2014, pursuant to Texas Patent Rule
23 4-2, the parties exchanged their preliminary claim constructions for the previously identified
24 terms. (*Id.*, ¶ 10.) The parties also exchanged extrinsic evidence that they intended to rely upon.
25 (*Id.*) Based on the parties’ exchanges and discussions, Bosch prepared a draft Joint Claim
26 Construction Statement and sought to meet and confer with Cardiocom in order to narrow the
27 issues. (*Id.*, ¶ 11.) Cardiocom, however, refused to participate in finalizing the joint statement,
28 forcing Bosch to file a separate Claim Construction Statement on April 15, 2014. (Dkt. No. 72.)

1 On March 10, 2014, the Texas Court granted Cardiocom's motion to transfer the case to
2 this district. (Dkt. No. 51.) Since then, the parties and this Court did substantive work, and still
3 Cardiocom did not seek a stay. The case appeared on this Court's electronic docket on April 8,
4 2014. Bosch, having discovered a serious conflict of interest on the part of Cardiocom's counsel,
5 promptly filed a motion to disqualify Cardiocom's counsel at Merchant & Gould. (Dkt. No. 60.)
6 Thereafter, Cardiocom moved to relate this case to an earlier, stayed case between Bosch and
7 Cardiocom pending before Judge Davila. (*Robert Bosch Healthcare Systems, Inc. v. Cardiocom,*
8 *LLC*, Case No. 12-cv-03864 ("First Case"), Dkt. No. 55.) Cardiocom also moved to vacate the
9 hearing on Bosch's motion to disqualify, which Bosch opposed and the Court ultimately denied
10 as moot. (Dkt. Nos. 68, 70, 88.) Cardiocom further sought *pro hac vice* admission for additional
11 Merchant & Gould attorneys, over Bosch's objection. (Dkt. Nos. 73, 74.) On May 1, 2014,
12 Judge Davila determined that this case and the First Case are not related. (Case No. 12-cv-03864,
13 Dkt. No. 64 at 2.) Since Judge Davila's decision eliminated any reason for this case to proceed in
14 this district instead of Bosch's originally-selected forum, Bosch moved to transfer this case back
15 to Texas. (Dkt. No. 92.) As of the filing of this opposition, Bosch's motion to transfer will have
16 been fully briefed.

17 On May 15, 2014, having litigated for over a year and only when faced with pending
18 motions to disqualify its counsel and re-transfer the case to a forum that Cardiocom believes to be
19 "stay-adverse" (Mot. at 8), Cardiocom finally moved for a stay.

20 **B. Cardiocom's Results Before the Patent Office Do Not Justify a Stay.**

21 Cardiocom argues that a stay is warranted because of its pending request to have the PTO
22 invalidate claims of the asserted patents. But there has been no action by the PTO to make a
23 motion to stay now timely. To the contrary, the PTO has rejected a number of Cardiocom's
24 petitions.

25 In July 2013, nearly three months after Bosch filed this case, Cardiocom filed petitions for
26 IPR of all six patents-in-suit. These petitions failed, however, to identify even a single
27 anticipatory reference for any claim. Instead, Cardiocom alleged that the patents-in-suit were
28 obvious over combinations of up to four separate prior art references. As noted above,

Cardiocom did not move to stay after filing the IPRs – a tacit admission that such a motion would be unwarranted.

In January 2014, the PTO issued decisions on Cardiocom’s petitions. Two of Cardiocom’s petitions were denied in their entirety. (Ong Decl., Exs. 5-6.) The petitions on the other four patents were denied in part, with the PTO instituting review only on certain claims and on limited grounds. (See Dkt. Nos. 100-5 to 100-9.) The PTO’s decisions are summarized in the following chart, alongside a list of the asserted claims:

Patent	PTO Decision on July 2013 Petitions	Claims Asserted in Litigation
7,921,186 (“186 patent”)	Granted on claims 1-6 but as to grounds 6 and 7 only. Denied as to grounds 1-5.	1-4, 6, 9-12, 14, and 15
7,769,605 (“605 patent”)	Denied.	1-4 and 7-9
7,840,420 (“420 patent”)	Granted on claims 1-5 but as to grounds 1 and 4 only. Denied as to grounds 2 and 3.	1-5
7,587,469 (“469 patent”)	Granted as to claims 1, 2, and 5-10 only. (Denied as to claims 3, 4, and 11-22.)	1-3, 10-13, 16-19, and 22
7,870,249 (“249 patent”)	Denied.	1, 2, 6-8, and 11-13
7,516,192 (“192 patent”)	For claims 1-19, granted as to grounds 1 and 2 only; for claims 20-37, granted as to grounds 1-3.	1-4, 6, 8-11, 17-21, 23, 24, 26-29, 31-33, and 35-37

Thus, *all claims of two of the six patents-in-suit, and most of the asserted claims of a third patent are not subject to any instituted proceeding.* As to those claims, the PTO determined that Cardiocom had not shown even “a reasonable likelihood” of prevailing. (Ong Decl., Ex. 5 at 19; Ex. 6 at 15; *see also* 35 U.S.C. § 314(a).) If Cardiocom is right that “the vast majority of requests for *inter partes* review are accepted” (Mot. at 17), then Cardiocom’s rate of failure demonstrates the weakness of Cardiocom’s invalidity arguments.

The four instituted proceedings were placed on a coordinated schedule with oral argument set for September 9, 2014. (See Dkt. Nos. 100-10 to 100-12.) But, perhaps recognizing that the PTO’s limited review would not be an adequate basis, Cardiocom again chose not to move to stay this case.

1 Between February and April 2014, Cardiocom (through its parent company Medtronic)
2 filed another four IPR petitions targeting the '605, '249, and '469 patents, on which Cardiocom
3 earlier had had little to no success. As before, Cardiocom failed to identify any anticipatory prior
4 art. None of these newly requested proceedings have been instituted. Bosch has only had the
5 opportunity to respond to the earliest-filed of these new petitions. In that response, Bosch
6 demonstrates that the petition is procedurally barred, and that Cardiocom has failed to show that
7 any claim is invalid. Once more recognizing that the pending petitions do not justify a stay,
8 Cardiocom continued to litigate this case.

9 Cardiocom also fell back on the old, slow reexamination procedure and filed requests for
10 *ex parte* reexamination against the '605 and '249 patents on February 27 and March 7, 2014,
11 respectively. (Dkt. No. 99, ¶ 13.) As with the new IPR petitions, the PTO has yet to rule on
12 either of these requests, and Cardiocom did not seek a stay after filing them.

13 There has been no recent action by the PTO to justify a stay of the case. Indeed,
14 Cardiocom's decision to litigate – coupled with the PTO's rejection of Cardiocom's IPR
15 arguments – shows that a stay is unwarranted.

16 C. **Bosch and Cardiocom are Direct Competitors, and Bosch Is Being Harmed**
17 **by Cardiocom's Infringement.**

18 Bosch would be harmed by a stay of this litigation. (Decl. of Klaus Bachmann in Supp. of
19 Opp. to Mot. to Stay ("Bachmann Decl."), ¶ 11; Decl. of William C. Broderick in Supp. of Opp.
20 to Mot. to Stay ("Broderick Decl."), ¶ 15; Decl. of Tim Conroy in Supp. of Opp. to Mot. to Stay
21 ("Conroy Decl."), ¶ 14.)² Bosch is heavily impacted by Cardiocom's continued patent
22 infringement, which allows it to compete unfairly with Bosch in the marketplace. (Bachmann
23 Decl., ¶ 11; Broderick Decl., ¶ 15.) [REDACTED]

24 [REDACTED]
25 Thus, a stay would be extremely prejudicial.

26
27
28 ² The declarations of Messrs. Bachmann, Broderick, and Conroy, who are all Bosch personnel,
are being submitted under seal.

1 Bosch and Cardiocom are direct competitors in the telehealth market. (Broderick Decl.,
2 ¶ 3; *see also* Conroy Decl., ¶ 13.) Telehealth, as explained by the U.S. Department of Health and
3 Human Services, refers to “the use of electronic information and telecommunications
4 technologies to support long-distance clinical health care, patient and professional health-related
5 education, public health and health administration.” *Telehealth*, [http://www.hrsa.gov/ruralhealth/
6 about/telehealth/](http://www.hrsa.gov/ruralhealth/about/telehealth/) (last accessed May 29, 2014). Bosch provides two telehealth systems – the
7 Health Buddy telehealth system and the T-400 telehealth system – that allow at-home patients to
8 communicate remotely with their healthcare providers, collect physiological measurements,
9 transmit data about their health status, and receive health-related education. (Broderick Decl., ¶
10 4.) These systems also enable healthcare providers to monitor and manage large populations of
11 patients, remotely reconfigure patient devices, and easily identify patients needing follow-up care.
12 (*Id.*) These features are at the heart of the patents-in-suit. Cardiocom has consistently marketed
13 its own products as similar to Bosch’s systems by emphasizing those same features. (*Id.*, ¶ 5.)
14 Thus, by using Bosch’s intellectual property, Cardiocom is able to leverage Bosch’s historical
15 success to promote Cardiocom products. (*Id.*, ¶ 6.)

16 Bosch and Cardiocom directly and regularly compete with each other for important
17 contracts with telehealth customers including healthcare providers, hospital systems, insurance
18 companies, and hospice care providers. (*Id.*, ¶ 3.) In particular, Bosch and Cardiocom are two of
19 only five telehealth vendors competing for business from the U.S. Department of Veterans Affairs
20 (“VA”). (*Id.*, ¶ 8.) In 2011, the VA selected Bosch and these additional vendors to compete for
21 an expected \$225 million worth of home health monitoring services contracts, to be completed
22 within five years. (Bachmann Decl., ¶ 5.)

23 The VA plays a key role in the telehealth market, in part because it has the largest
24 telehealth deployment in the world. (Broderick Decl., ¶ 7.) The VA publishes its outcomes,
25 many of which comprise results from use of Bosch’s Health Buddy system, and which are widely
26 cited by advocates of telehealth. (*Id.*) [REDACTED]

27 [REDACTED] In addition,
28 the VA contract helps Bosch attract other customers. (Conroy Decl., ¶ 7.) Contracts like those

1 with the VA are crucial to a telehealth business because [REDACTED]

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 Since 2011, when the VA first selected Cardiocom as a vendor, [REDACTED]

6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 Once a customer begins using a particular vendor's telehealth solution, there are
15 significant "lock-in" effects that make the customer less likely to switch away from its selected
16 technology. (Broderick Decl., ¶ 14.) For example, there are significant transaction costs,
17 including equipment, IT, and the need to train clinicians on work flow changes. (*Id.*) In addition,
18 patients place a high premium on the comfort and consistency of a known and reliable patient
19 care technology. (*Id.*) Thus, once Bosch loses a contract to Cardiocom, it becomes much more
20 difficult for Bosch to win that customer in the future. (*Id.*) The lock-in problem is particularly
21 acute in the VA system because of [REDACTED]
22 [REDACTED]

23 Moreover, the harm to Bosch from losing a contract cannot merely be measured in
24 Cardiocom's corresponding sales. (*Id.*, ¶ 13.) Rather, Cardiocom is depriving Bosch of customer
25 relationships and immeasurable opportunities to introduce its telehealth systems to patients and
26 sell additional services and features to customers. (*Id.*)

27 The harm caused by Cardiocom described above was just becoming apparent when Bosch
28 filed the First Case in 2012, alleging that Cardiocom infringes six patents not asserted here. The

1 situation has only worsened since Cardiocom successfully moved to stay that case, confirming
2 that Bosch's business will be irreparably injured if Cardiocom's infringement is permitted to
3 continue during the pendency of a stay.

4 **III. LEGAL STANDARDS**

5 There is no per se rule that patent cases should be stayed pending PTO proceedings,
6 because such a rule "would invite parties to unilaterally derail" litigation. *Largan Precision Co.,*
7 *Ltd. v. Fujifilm Corp.*, No. C 10-1318 SBA, 2011 U.S. Dist. LEXIS 25423, at *6 (N.D. Cal. Mar.
8 1, 2011) (citing *Soverain Software LLC v. Amazon.com, Inc.*, 356 F. Supp. 2d 660, 662 (E.D. Tex.
9 2005)). The decision whether to stay an action is entirely within this Court's discretion. *Landis*
10 *v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1427
11 (Fed. Cir. 1988). "The party seeking the stay has the burden of showing the appropriateness of
12 the stay." *Pi-Net Int'l, Inc. v. Focus Bus. Bank*, No. C-12-4958-PSG, 2013 U.S. Dist. LEXIS
13 118723, at *10-11 (N.D. Cal. Aug. 16, 2013).

14 Courts consider the following factors when determining whether to grant or deny a stay
15 pending reexamination: (1) whether a stay would unduly prejudice or present a clear tactical
16 disadvantage to the nonmoving party; (2) whether a stay would simplify the issues in question
17 and trial of the case; and (3) whether discovery is complete and whether a trial date has been set.
18 *See Telemac Corp. v. Teledigital, Inc.* 450 F. Supp. 2d 1107, 1111 (N.D. Cal. 2006). "Courts also
19 consider evidence of dilatory motives or tactics, such as when a party unduly delays in seeking
20 reexamination of a patent." *Sorenson v. Digital Networks N. Am., Inc.*, 2008 U.S. Dist. LEXIS
21 6454, at *5 (N.D. Cal. Jan. 16, 2008).

22 Courts have generally denied requests for stays when the parties are competitors in the
23 marketplace, finding that such a stay would prejudice the non-moving party because
24 "infringement among competitors can cause harm in the marketplace that is not compensable by
25 readily calculable money damages." *Avago Tech. Fiber v. IPTronics*, No. 10-CV-02863-EJD,
26 2011 U.S. Dist. LEXIS 82665, at *16 (N.D. Cal. July 28, 2011) (citing *Acumed LLC v. Stryker*
27 *Corp.*, 551 F.3d 1323, 1327-28 (Fed. Cir. 2008)); *TPK Touch Sol'ns, Inc. v. Wintek Electro-*
28 *Optics Corp.*, 2013 U.S. Dist. LEXIS 162521, at *17 (N.D. Cal. Nov. 13, 2013) ("Because TPK

1 and Wintek are direct competitors, the risk of prejudice is higher to the non-moving party than it
2 would be otherwise.”); *Tesco Corp. v. Weatherford Int’l, Inc.*, 599 F. Supp. 2d 848, 851 (S.D.
3 Tex. 2009) (collecting cases). For a stay to be granted in the face of prejudice to the non-moving
4 party, the moving party must make out a “clear case of hardship or inequity in being required to
5 go forward.” *IMAX Corp. v. In-Three, Inc.*, 385 F. Supp. 2d 1030, 1032 (C.D. Cal. 2005)
6 (quoting *Unidisco v. Schattner*, 210 U.S.P.Q. 622, 629 (D. Md. 1981)).

7 **IV. ARGUMENT**

8 Cardiocom’s motion to stay should be denied for multiple independent reasons. First,
9 Cardiocom’s delay in seeking a stay shows that it is doing so now only to seek an improper
10 tactical advantage. That, in itself, justifies denying a stay. Second, Cardiocom has not met its
11 burden to show that the multi-factor test weighs in favor of a stay. Because the parties are direct
12 competitors, Bosch will suffer significant prejudice from a stay, which delays Bosch’s ability to
13 vindicate its patent rights while Cardiocom continues its course of long-term, willful
14 infringement. Furthermore, a stay will not significantly simplify the issues in this case because a
15 third of the asserted patent claims are not subject to instituted PTO proceedings, and Cardiocom
16 plainly intends to relitigate any unfavorable results from the proceedings that *are* pending. The
17 amount of activity that has occurred in litigation also weighs against a stay.

18 Instead of addressing the merits of a stay in *this* case, Cardiocom fixates on the facts of
19 the First Case. However, Judge Davila’s decision in the First Case is entirely distinguishable
20 from the situation here. In particular, in finding that Bosch would not be prejudiced by a stay of
21 the First Case, Judge Davila relied on conduct that occurred before the patents in this case had
22 even issued – such conduct therefore could not support a stay here. Thus, Cardiocom cannot
23 rebut Bosch’s showing of the substantial prejudice and harm that Bosch would suffer if this case
24 is stayed.

25 **A. Cardiocom’s Significant Delay in Seeking a Stay Is in Itself Sufficient Reason** 26 **to Deny the Motion.**

27 After this case was filed, Cardiocom took three months to seek IPRs of the patents-in-suit
28 and waited another eleven months after that before moving to stay. “Such dilatory requests for a

1 stay are routinely denied.” *Cynosure, Inc. v. Cooltouch, Inc.*, No. 08-10026-NMG, 2009 U.S.
2 Dist. LEXIS 70493, at *6 (D. Mass. Aug. 10, 2009); *see also Affinity Labs of Tex. v. Apple Inc.*,
3 No. 09-04436 CW, 2010 U.S. Dist. LEXIS 50974, at *6 (N.D. Cal. April 29, 2010).

4 The reasoning in *Affinity Labs* applies here. That case was filed in March 2009 and later
5 transferred to this district. *Affinity Labs*, 2010 U.S. Dist. LEXIS 50974, at *6. The defendant,
6 however, waited until November 2009 to file its request for *inter partes* reexamination of the
7 asserted patent, and, once the request was granted in February 2010, it waited another seven
8 weeks before filing its motion to stay. *Id.* The court found that “***these significant delays weigh***
9 ***heavily against granting the stay.***” *Id.* (emphasis added). Here, only some of Cardiocom’s
10 petitions were granted, and Cardiocom waited even longer after the PTO’s decision on the IPRs –
11 almost four months – before moving to stay.

12 Because of the delays and the resultant prejudice to the plaintiff, the *Affinity Labs* court
13 denied the motion to stay even though the earlier transfer motion was the only activity that had
14 occurred in the case. *Id.* at *4, *6-7 (noting “[n]o discovery has taken place, no trial date has
15 been set and the parties have not even appeared in Court for their initial case management
16 conference”). Here, in contrast, Cardiocom’s delay allowed significant case management,
17 discovery, and claim construction activity to occur, subjecting the parties to significant litigation
18 expenses. Thus, this case presents even more compelling reasons to deny a stay than *Affinity*
19 *Labs* did.

20 Cardiocom tries to excuse its delay by claiming it “minimized any potential prejudice to
21 Bosch by waiting to file its motion to stay until after the Board issued a decision on Cardioom’s
22 initial petitions.” (Mot. at 20.) This argument is absurd, for two reasons. First, the PTO declined
23 to institute review on many of Cardiocom’s arguments and on two patents entirely. Second,
24 Cardiocom continued to wait from January until May before filing its motion. In just those
25 additional four months, the litigation has progressed substantially, and Bosch has incurred
26 significant litigation expenses. Among other things, Bosch has reviewed Cardiocom’s source
27 code – an important and expensive step in developing an infringement case – and supplemented
28 its infringement contentions. Bosch also had to develop and disclose claim construction positions

1 for over a hundred claim terms identified by Cardiocom – a significant burden that was
2 particularly egregious because Cardiocom sought construction of only eight terms in the IPRs
3 across all claims of all six patents. Thus, far from minimizing the prejudice to Bosch,
4 Cardiocom’s delay has done nothing but make a stay less and less justified.

5 Cardiocom alleges that Bosch’s recent motions “have prompted Cardiocom to file the
6 instant motion to stay.” (Mot. at 2.) If true, this is a telling admission that Cardiocom never
7 intended to move for a stay until things started going south in the litigation. Cardiocom lost its
8 motion to relate this case to the First Case (which led directly to Bosch’s re-transfer motion), and
9 it faces disqualification of its original counsel, who have breached their duties of loyalty and
10 confidentiality to Bosch by representing Cardiocom in this case (*see* Dkt. No. 59). A stay would
11 derail the litigation and allow Cardiocom to avoid potential adverse rulings, while freeing
12 Cardiocom to take its chances before the PTO. Thus, Cardiocom’s motion is the kind of attempt
13 to gain a tactical advantage that courts do not condone. *Cf. Belden Techs. Inc. v. Superior Essex*
14 *Comm’ns LP*, No. 08-63-SLR, 2010 U.S. Dist. LEXIS 90960, at *7-8 (D. Del. Sept. 2, 2010)
15 (finding that delay “may lead to an inference that the moving party is seeking an inappropriate
16 tactical advantage” and noting the defendant “has chosen to reveal its desire to stay litigation only
17 after the issuance of the memorandum opinion [on the parties’ motions for summary judgment]”).

18 **B. The Three Factors Weigh Against a Stay.**

19 When Cardiocom’s delay in bringing its motion is considered together with all of the
20 circumstances, it is clear that the traditional three-factor test also militates against a stay.

21 **1. A Stay Will Cause Unfair Prejudice to and Disadvantage Bosch.**

22 Bosch faces multiple sources of unfair prejudice and irreparable harm if a stay is granted.
23 First, as explained above, significant prejudice is directly attributable to Cardiocom’s delay in
24 seeking a stay. Moreover, Bosch is suffering and will continue to suffer significant competitive
25 harm as a result of Cardiocom’s infringement. Finally, it may take the PTO many years to
26 complete the various proceedings Cardiocom has sought to initiate, so that by the time the
27 patents-in-suit are upheld by the PTO and Bosch can enforce them in court, the patents would
28 likely be expired.

1 **a. Bosch Is Being Harmed in the Marketplace.**

2 A stay will prolong the ongoing harm to Bosch caused by Cardiocom’s infringing
3 activities. This harm cannot be reversed or compensated for. *See* Section II.C, *supra*. Courts
4 have repeatedly recognized that “competitors can cause harm in the marketplace that is not
5 compensable by readily calculable money damages.” *Avago*, 2011 U.S. Dist. LEXIS 82665, at
6 *16 (citing *Acumed LLC v. Stryker Corp.*, 552 F.3d 1323, 1327-28 (Fed. Cir. 2008)); *accord*
7 *Biomet Biologics v. Bio Rich Med.*, No. SACV 10-1582 DOC (PJWx), 2011 U.S. Dist. LEXIS
8 109282, at *6 (C.D. Cal. Sept. 26, 2011) (“[B]ecause Defendants allegedly continue to infringe
9 upon Plaintiffs’ patent in direct competition with Plaintiff, a delay has the potential to cause
10 severe prejudice.”). Thus, “competition can justify denial of a stay when that competition is
11 based on alleged infringement and has effects that would be difficult to reverse after the fact.”
12 *Avago*, 2011 U.S. Dist. LEXIS 82665, at *17.

13 Cardiocom argues that because Bosch has in the past offered limited licenses for other
14 patents to certain companies, Bosch can be entirely compensated by monetary damages. (Mot. at
15 20-21.) Both the United States Supreme Court and the Federal Circuit, however, have flatly
16 rejected Cardiocom’s licensing argument and have found “a plaintiff’s willingness to license its
17 patents” insufficient to establish that the patent holder would not suffer irreparable harm from
18 continued infringement. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (U.S. 2006);
19 *see also Acumed*, 551 F.3d at 1328. Instead, a patentee’s licensing activity is “but one factor for
20 the district court to consider” when determining whether the patentee would suffer irreparable
21 harm. *Acumed*, 551 F.3d at 1328. [REDACTED]

22 [REDACTED]
23 [REDACTED]
24 [REDACTED]³ *Cf. TPK Touch*, 2013 U.S. Dist. LEXIS
25 162521, at *17-19 (finding potential for competitive harm where plaintiff had lost market share to
26 defendant and defendant was one of a few competitors “within the relevant high-end segments of

27 _____
28 ³ When Bosch offered Cardiocom a patent license in 2007, the patents-in-suit had not yet issued,
nor had Cardiocom been selected by the VA.

1 that market”).

2 Cardiocom also suggests there is significance in the fact that Bosch never sought a
3 preliminary injunction. (Mot. at 20.) However, this argument, too, has been squarely rejected by
4 the courts. *See Avago*, 2011 U.S. Dist. LEXIS 82665, at *17 (rejecting defendant’s contention as
5 “flawed” and noting plaintiffs “might have other reasons for deciding not to pursue injunctive
6 relief”); *Biomet Biologics*, 2011 U.S. Dist. LEXIS 109282, at *6-7.

7 Finally, Cardiocom argues that Bosch would not be prejudiced because Bosch chose not
8 to assert the patents-in-suit in the First Case. (Mot. at 3.) There simply is no such rule. Bosch
9 has over a hundred telehealth-related patents, and Cardiocom’s suggestion that Bosch was
10 obligated to assert them all in a single lawsuit is absurd. In bringing the First Case, Bosch acted
11 reasonably in choosing a manageable number of patents to assert against Cardiocom. Cardiocom,
12 however, has used the stay of the First Case not to rectify its infringement but to cement its
13 unfairly obtained position in the market. Thus, Bosch was forced to identify additional infringed
14 patents and file the present case. Far from showing that Bosch is not prejudiced, Bosch’s
15 bringing of this Second Case against Cardiocom demonstrates that Bosch is suffering substantial
16 harm from Cardiocom’s continued infringement.

17 **b. The Longer the Stay, the Greater the Prejudice to Bosch.**

18 A stay would prejudicially delay Bosch’s ability to enforce its patents. There is particular
19 urgency here because the patents-in-suit will expire beginning in late 2016, and all six patents
20 will be expired by the end of 2017. *See Biomet Biologics*, 2011 U.S. Dist. LEXIS 109282, at *7
21 (“Placing the [asserted] patent in limbo for the majority of its remaining life would create a clear
22 tactical disadvantage for Plaintiffs. Thus, the prejudice factor weighs strongly against granting [a
23 stay].”). In addition, opportunities like the VA contracts are time-sensitive. The VA’s most
24 recent contract awards, for example, last only until 2016. A stay would effectively give
25 Cardiocom *carte blanche* to compete against Bosch in this defined market space with a product
26 that uses Bosch’s intellectual property. And, as discussed above, money damages would not be
27 able to compensate Bosch for the lost relationships, opportunities, and market share made
28 available through this unique sub-market.

1 Cardiocom relies on the fact that the instituted IPRs may be decided in January 2015 as
2 the basis for why a stay might not be prejudicial. (Mot. at 19.) But there is no way to know if the
3 PTO will keep to its schedule. Cardiocom acknowledges that there could be an additional six
4 month delay. (*Id.*) Further, Cardiocom’s new IPRs risk additional delay as the PTO may
5 consolidate the proceedings on a later schedule. *See* 35 U.S.C. § 316(a)(11) (permitting the PTO
6 to adjust statutory deadlines “in the case of joinder”).⁴ Moreover, a stay until January, as
7 explained below, would not significantly simplify the litigation because, *inter alia*, those IPRs
8 would not apply to two of the patents-in-suit and most of the asserted claims from a third.

9 To the extent Cardiocom is seeking a stay that encompasses its other PTO petitions, such
10 a stay could last far beyond January 2015.⁵ For example, Cardiocom’s most recent IPR petition
11 was not filed until April 25, 2014. (Ong Decl., ¶ 13.) Bosch’s preliminary response is due on
12 July 29, 2014 (*id.*, Ex. 2), and the PTO is to issue a decision by October 29, 2014 (*see* 35 U.S.C. §
13 314(b)). In the event that the PTO institutes review, it would have at least one year (with a
14 potential six-month extension) to render a final written decision. *See* 35 U.S.C. § 316(a)(11).
15 Thus, just waiting for the other IPRs might stretch the stay through most of 2015. This does not
16 include appeals. A stay that encompasses the *ex parte* reexaminations could last even longer.
17 The average pendency of *ex parte* reexaminations is about two years (Ong Decl., Ex. 3),
18 potentially taking the stay through Spring of 2016. By that time, it would be practically
19 impossible for Bosch to litigate the patents-in-suit before they expire.

20 While Bosch does not believe that any of these later-filed petitions should be granted by
21

22 ⁴ In fact, when Cardiocom filed its second IPR on the ’469 patent, it simultaneously filed a
23 motion to join that IPR with the already-instituted proceeding on the ’469 patent. If Cardiocom’s
24 motion is granted, the proceedings on the ’469 will likely have to be delayed to allow the PTO
25 and the parties to address the newly asserted arguments and prior art. Furthermore, Cardiocom
26 has argued that the four instituted proceedings are related, and the PTO has entered a common
27 schedule, so Cardiocom’s joinder motion could lead to *all* of the instituted IPRs being delayed.

28 ⁵ Cardiocom’s motion is singularly unclear about the scope of the stay it is seeking. Cardiocom’s
Notice of Motion, for example, asks for a stay “pending the decision of the *inter partes* review
(IPR) **and reexamination proceedings**” (Mot. at 1 (emphasis added)), but Cardiocom concludes
with a “request[] that the Court grant Cardiocom’s motion to stay the litigation **until the IPR
proceedings are concluded**,” with no mention of reexaminations and with no explanation as to
whether it means the pending IPRs or the later filed ones it now seeks to institute (*id.* at 22
(emphasis added)).

1 the PTO, it appears that Cardiocom will do all that it can to delay a resolution on the merits.
2 Cardiocom proved this in its opposition to Bosch's motion to transfer, wherein Cardiocom
3 admitted that its desired stay would last just as long as the stay in the First Case: "Cardiocom has
4 moved to stay this case pending *inter partes* reviews and *ex parte* reexamination proceedings related
5 to the patents in suit. ***This case would be on track with the First Case if it were stayed.***" (Dkt. No.
6 101 at 4 n.2 (emphasis added).) That directly contradicts Cardiocom's assertion that "the stay is
7 likely to be shorter" in this case. (Mot. at 12.) And in the First Case, Cardiocom just filed
8 another request for reexamination, a year and a half after its original requests, because its earlier
9 reexamination on that patent ended in all of the claims being upheld by the PTO. (Ong Decl., ¶
10 16.) This demonstrates Cardiocom's practice of prolonging a stay by taking advantage of the
11 time it takes the PTO to conduct proceedings, even when the patent claims are valid. Cardiocom
12 could equally use that delay tactic if a stay were granted beyond the first four IPRs.

13 Thus, the competitive harm to Bosch and the likelihood of substantial delay tips the
14 "prejudice" factor strongly against a stay.

15 **2. The Proceedings Before the Patent Office Will Not Significantly**
16 **Simplify the Issues in the Case.**

17 Cardiocom cannot justify a stay of this case given its delay and spotty track record before
18 the PTO. As explained above, ***two of the six patents-in-suit and over half of the claims of a***
19 ***third patent are not subject to any instituted proceeding.*** See Section II.B, *supra*. In terms of
20 asserted claims, this amounts to 25 out of 70 asserted claims – over a third – where Cardiocom
21 could not even meet the minimum threshold necessary to initiate *inter partes* review, let alone
22 prove any claim is invalid. Cardiocom relies on the fact that "[e]very one of the claims that is not
23 part of an instituted IPR is now subject to a pending IPR petition." (Mot. at 18.) But those new
24 petitions are no more than a desperate second attempt to invalidate claims where the PTO has
25 already rejected Cardiocom's initial effort. In addition to opposing them on the merits, Bosch is
26 also challenging those petitions as a procedurally improper second bite at the apple. Thus,
27 Cardiocom's hope that the Board may institute those proceedings is unfounded.

28 The PTO's denial of Cardiocom's original IPR petitions makes it significantly more likely

1 that the PTO will *not* resolve many of the issues in this case. Thus, there is no basis to stay the
2 entire case. *See Largan*, 2011 U.S. Dist. LEXIS 25423, at *7-10 (denying stay where not all
3 patents-in-suit were in reexamination).

4 Cardiocom also overstates the potential benefits of a stay with respect to the limited
5 number of claims subject to review. For example, Cardiocom supposes that “should Bosch
6 amend any claims,” the parties will be able to avoid claim construction and discovery with
7 respect to the pre-amendment claims. (Mot. at 11.) However, the deadline has already passed for
8 Bosch to seek to amend its claims in the pending IPRs, and no amendments were filed. (Ong
9 Decl., ¶ 17.) In addition, if the Court requires it as a condition of denying the stay, Bosch will
10 agree that, even if the PTO institutes additional IPR proceedings, Bosch will not seek to amend
11 any asserted claims of the patents-in-suit.

12 Cardiocom also raises the possibility of “extensive claim construction [] analysis” from
13 the PTO to help guide this Court. (*Id.* at 3.) However, Cardiocom has made clear that it does not
14 see the PTO’s claim construction rulings as applicable to this case. (*See, e.g., Ong Decl. Ex. 4 at*
15 11 (“The following terms are construed as following, *for purposes of this inter partes review*
16 *only.*” (emphasis added))). In addition, Cardiocom’s IPR petitions sought construction of only
17 eight claim terms, and the PTO has already adopted constructions for purposes of the IPRs. Thus,
18 the Court already has whatever benefit may come from the PTO’s claim construction and would
19 still be largely on its own with respect to the 35 claim terms for which Cardiocom has proposed
20 constructions in litigation.

21 At this point, the only possible benefit of a stay would be the estoppel effect of the IPRs,
22 which bars a party from asserting in litigation that a claim is invalid once the PTO issues a final
23 written decision. *See* 35 U.S.C. § 315(e)(2). However, Cardiocom served thousands of pages of
24 invalidity contentions in this case, citing numerous prior art references not cited in the IPRs.
25 (Ong Decl., ¶ 5.) Plainly Cardiocom seeks to evade the estoppel and intends to relitigate
26 invalidity if it loses at the PTO. Under Cardiocom’s approach, then, a stay will not simplify this
27 case at all.

1 **3. Cardiocom Cannot Use Its Own Stonewalling to Justify a Stay.**

2 The last factor in a stay analysis asks whether discovery is complete and a trial date has
3 been set. Under the Texas Court’s schedule, the parties were set to go to trial in January 2015 –
4 right when Cardiocom predicts the IPRs will be decided – and the parties were to have completed
5 document discovery two weeks ago. The only reason more has not happened in this case is that
6 Cardiocom began refusing to cooperate in the discovery and claim construction processes. For
7 example, despite the clear deadlines set forth in the Texas Court’s scheduling order and in this
8 district’s Patent Local Rules, Cardiocom ignored all of Bosch’s requests to submit a joint claim
9 construction statement. (*See* Dkt. No. 72.) In addition, Cardiocom refused to produce additional
10 discovery because it claimed it might – at some indefinite date in the future – move to stay the
11 case. (Ong Decl., Ex. 1.) While Cardiocom finally moved to stay on May 15, 2014 – over a year
12 after the case began – it cannot use its own dilatory conduct to justify a stay.

13 Thus, this factor does not weigh in favor of a stay.

14 **C. Judge Davila’s Decision to Stay an Earlier, Unrelated Case Does Not Control**
15 **the Outcome Here.**

16 Cardiocom’s main argument for staying this case is that an earlier, unrelated case
17 involving different patents was stayed by Judge Davila. However, as noted above, Judge Davila
18 has already determined that this case and the First Case are not even related cases within the
19 meaning of the Civil Local Rules. (Case No. 12-cv-03864, Dkt. No. 64 at 2.) Furthermore, this
20 case differs from the First Case in every respect that Judge Davila considered when staying the
21 First Case:

- 22 • In the First Case, Cardiocom sought a stay two months after filing of the complaint
23 and before discovery, infringement and invalidity contentions, claim construction, or
24 any of the other activities that have occurred in this case. (*Id.*, Dkt. No. 43 at 3.)
25 Here, Cardiocom delayed for over a year, during which there was significant progress
26 in the litigation.
- 27 • A stay in this case is less likely to significantly simplify the issues, since (1) the PTO
28 has already upheld over a third of the asserted claims, (2) Cardiocom has argued that

1 claim construction in the IPRs does not apply to district court litigation, and (3)
2 Cardiocom has served thousands of pages of invalidity contentions, proving that it
3 seeks to relitigate the very heart of the IPRs.

- 4 • In finding that money damages could adequately compensate Bosch, Judge Davila
5 relied on the fact that Bosch licensed the patents in the First Case and had, in 2007,
6 offered to license those patents to Cardiocom. (*Id.* at 5.) But Cardiocom rejected the
7 offer, and the earliest patent in this case only issued on April 7, 2009, which was *after*
8 the licensing offer Judge Davila relied upon. In addition, Bosch has presented
9 evidence that Cardiocom is differently situated from Bosch's licensees and is causing
10 competitive harm to Bosch.⁶

11 Thus, reliance on Judge Davila's order is insufficient to justify a stay here.

12 **V. CONCLUSION**

13 For each and all of the foregoing reasons, Bosch respectfully requests that the Court deny
14 Cardiocom's motion to stay.

15
16
17 Dated: May 29, 2014

Respectfully submitted,

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18
19
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25
26
27 ⁶ In the First Case, Cardiocom waited until its reply brief to raise the issue of Bosch's licensing.
28 Bosch was therefore deprived of the opportunity to squarely address the argument and to
distinguish the licenses from the prejudice Bosch would suffer if this case were stayed and
Cardiocom permitted to continue infringing. (*See* Case No. 12-3864, Dkt. Nos. 42, 44.)